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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of)

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

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SUMMARY

Section 24.813(a) of the Rules, in its current form, requires that each broadband PCS applicant disclose businesses of all kinds 5 percent or more of whose stock is owned by the applicant or an officer, director or attributable stockholder. The Commission has stated that the "multiplier" should be used in determining attributable interests, such that holders of attributable direct and indirect interests in the applicant must disclose their 5 percent outside interests. While the Commission issued a partial waiver of these requirements for purposes of the Forms 175, winning bidders preparing their Forms 401 will face an enormous reporting burden. And, much of the information compiled will in no way serve the stated purposes of the Commission's disclosure rules, namely to police the multiple and cross-ownership rules, alien ownership restrictions and anti-collusion requirements. In fact, the enormity of these disclosure requirements will discourage investment in PCS by many potential investors, thus restricting the access of smaller companies to the capital that they will need to compete in PCS. The paramount goal of promoting competition among a diverse group of PCS service providers will be thwarted.

Accordingly, it is requested that the Commission modify Section 24.813(a) to provide that disclosure of outside ownership interests is limited to direct interests in broadband PCS, cellular or SMR licensees or applicants. These requirements, which are consistent with those pertaining to the Forms 175, will guard against anti-competitive concentration while insuring the free flow of capital needed to promote competitive diversity among PCS service providers.

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Western PCS Corporation, by its attorneys and pursuant to Section 1.429 of the Federal Communications Commission's ("Commission's") Rules, 47 C.F.R. §1.429, respectfully submits this petition for reconsideration and clarification of the Commission's Order released October 25, 1994 in the captioned proceeding.^{1/}

I. INTRODUCTION

Section 24.813(a) of the Rules, 47 C.F.R. §24.813(a)(1), provides that each application (including Forms 175 and 401) for a broadband PCS license shall disclose fully the real party in interest and must include the following information:

- (1) A list of any business five percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, attributable stockholder or key management personnel of the applicant.

(emphasis added). The qualifier "attributable" was added by the Fourth Memorandum Opinion and Order, PP Docket No. 93-253 (rel.

^{1/} Order, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253 (released October 25, 1994), ("Order"). The Commission has stated that, in order to facilitate a free flow of information between applicants and Commission staff, proceedings involving auction applicants are exempt from the ex parte prohibitions that generally pertain to restricted proceedings. See Public Notice, FCC 94-283, released November 7, 1994.

October 19, 1994) ("Fourth Order"). The Commission explained that by an "attributable" shareholder, "we mean a shareholder that holds an interest of 5 percent or more in a bidder or that holds an attributable interest in a bidder through the operation of the multiplier." Fourth Order at para. 58 n. 123 (emphasis added). Thus, the Commission clarified that not only stockholders with direct interests in the applicant, but also those with indirect interests through intermediate entities, would be required to list all entities in which they held a 5 percent interest. As we show herein, the rule remains needlessly broad in its disclosure requirements and, if left unqualified, will result in unintended effects which are inconsistent with the public interest.

By operation of the multiplier, any general partnership interests would be assigned a value of 100 percent,^{2/} meaning that general partners with an indirect ownership interest in an applicant of substantially less than 1 percent and holding no practical control over the applicant's operations or policies could be deemed to have an attributable interest in the applicant. Similarly, institutional investors with limited partnership interests in shareholders in a PCS applicant could be deemed to hold attributable interests in the PCS applicant, despite the fact that they had absolutely no control over applicant. Both cases present substantial - and potentially insurmountable - obstacles to investment in PCS by investment houses, pension funds and certain

^{2/} See Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended (Wilner & Scheiner), 103 FCC 2d 511 (1985).

other large institutional investors. The issue of negative consequences caused by unqualified use of the multiplier, relating to both PCS reporting and Commercial Mobile Radio Service ("CMRS") spectrum caps, is currently before the Commission in pending petitions for reconsideration^{3/} and requests for clarification.^{4/}

^{3/} See Petition for Reconsideration in GEN Docket No. 90-314, filed September 6, 1994 (requests elimination of the multiplier for institutional investors in broadband PCS or, at least, adoption of a single majority shareholder exemption and a one-year compliance period); Petition for Reconsideration and Clarification in GEN Docket No. 90-314, ET Docket No. 92-100, filed October 7, 1994 (requests elimination or qualification of multiplier for insulated limited partners investing in narrowband PCS).

^{4/} See Letter dated December 16, 1994 from Louis Gurman, Esquire to William E. Kennard, Esquire (GEN Docket No. 90-314; PP Docket No. 93-253), in which it is requested that the Commission limit the use of the multiplier as follows: affiliates and subsidiaries must be disclosed and counted for spectrum cap purposes only in the case of those indirect interest holders who either (a) hold a majority of the ownership interests or a direct controlling interest in a holder of a direct attributable interest in the applicant or (b) have a direct attributable interest in an entity holding a direct controlling interest in the applicant. Otherwise, holders of indirect - but technically attributable - interests in a PCS applicant would not be subject to the disclosure requirements of Sections 24.813(a)(1) and (2) or the CMRS spectrum aggregation limits. So tailoring the reach of the multiplier would encourage rather than discourage investment in PCS applicants by able and otherwise interested investors and thereby promote rather than squelch competition among a diverse group of PCS service providers, while at the same time preventing a single person or entity from aggregating real control or influence over licensees of excessive CMRS spectrum. See also Letter dated October 5, 1994 (GEN Docket No. 90-314; ET Docket No. 92-100) from Phillip L. Spector to William Caton (proposes elimination of multiplier in PCS, or at least (i) a single majority shareholder exception, (ii) a higher attribution threshold (10% suggested) and (iii) a compliance grace period of at least one year); Letter dated October 20, 1994 (GEN Docket No. 90-314; ET Docket No. 92-100) from Phillip L. Spector to William Caton (provides precedent for non-attribution of insulated limited partners in Sections 13(d) and 13(g) of the Securities and Exchange Act of 1934).

In response to certain requests for clarification,^{5/} the Commission has already issued a limited waiver of Section 24.813(a) for purposes of filing the Forms 175:

we waive the information disclosure requirement of Section 24.813(a)(1) and 24.813(a)(2) with respect to other, outside ownership interests of attributable stockholders of applicants, except that direct, attributable ownership interests in other Commercial Mobile Radio Service licensees or applicants shall be disclosed [Footnote reference to Section 20.6 of the Commission's rules].

Order at para. 4. The Commission added, however: "All long-form reporting requirements will continue to apply." Id. As a result, PCS applicants, should they win an auction, will continue to face enormous reporting requirements concerning indirect interests.

The Broadband PCS auction commenced on December 5, 1994, and a long-form application (FCC Form 401) must be filed by each winning bidder within ten (10) business days after the close of bidding. Therefore, it is imperative that the Commission clarify - and limit - the reach of Sections 24.813(a)(1) and (2) as soon as possible.

II. THE DISCLOSURE REQUIREMENTS MUST BE TAILORED TO COVER ONLY RELEVANT INTERESTS

The requirement under Section 24.813(a)(1), as currently in effect, that attributable shareholders in a PCS applicant disclose their outside business interests of all kinds will impose an enormous reporting burden without promoting the stated purposes of

^{5/} See, e.g., ex parte submission in PP Docket 93-253 of Gurman, Kurtis, Blask & Freedman, Chartered, October 12, 1994; ex parte submission in PP Docket 93-253 of Dow, Lohnes & Albertson, October 21, 1994.

the ownership disclosure rule. The Commission has stated that:

the purpose of the ownership disclosure requirements is to allow the Commission to determine who is the real party in interest [footnote 5 -- refers to 47 C.F.R. §§22.13, 24.413; Real Party in Interest, 55 RR 2d 1053 (1982)], to determine compliance with the anti-collusion rules [footnote 6 -- refers to Section 1.2105 of the Rules] and ownership restrictions such as the multiple- and cross-ownership rules [footnote 7 -- refers to Sections 24.204 and 24.229(c) of the Rules] and the alien ownership restrictions [footnote 8 -- refers to 47 U.S.C. §310(b)].

Order at para. 4. All information requested by Section 24.813 should have relevance to these regulatory purposes. These purposes are examined in detail below.

1. Determining Who is the Real Party in Interest.

In the Order, the Commission made reference to Section 22.13 of the Rules and Real Party in Interest Disclosure, 55 RR 2d 1053 (1982). Section 22.13, on which 24.813 was clearly modeled, by its terms is presently limited to real party or parties in interest "engaged in the Public Mobile Service."^{5/} The language of Real

^{5/} Section 22.13 has been recodified and amended as part of the Commission's comprehensive rewrite of Part 22 of the Rules, set forth in the Report and Order, FCC 94-201, CC Docket Nos. 92-115, 94-46 and 93-116 (rel. September 9, 1994), which becomes effective January 1, 1995. The new Section 22.108, which replaces existing Section 22.13, does not include the express limitation found in Section 22.13 to parties that are "engaged in Public Mobile Service." However, in the "Detailed Discussion of Part 22 Rule Amendments" set forth in the Report and Order, the Commission stated:

The intent of the NPRM was to propose the retention of the substance of §22.13(a)(1) as it existed prior to the NPRM with respect to the disclosure of real parties in interest.

Report and Order at A-9. Furthermore, in the Notice of Proposed Rule Making, Revision of Part 22 of the Commission's rules governing the Public Mobile Services, 7 FCC Rcd. 3658 (1992), the

Party in Interest Disclosure is to the same effect:

The real party in interest provisions were adopted to prevent an applicant from filing numerous applications in the same geographic area under different names. Thus, the entities required by these provisions [Sections 22.13(a)(1)(A)-(C)] to be listed are only those entities which have financial interests in PMRS licensees, permittees or applicants.

Real Party in Interest Disclosure Requirements in the Public Mobile Radio Service, 52 RR 2d (P&F) 1053, 1053 (1982). Unfortunately, the Commission did not so limit the disclosure requirements of Section 24.813 to the specific regulatory purposes it intended to

Commission stated that the revisions were proposed in order to eliminate "unnecessary information collection requirements," 7 FCC Rcd. at 3658, and that:

The proposals contained in this Notice are meant to simplify and ease the regulatory burden on all Public Mobile Services applicants and licensees consistent with the Commission's established public interest objectives.

Id. at 3662. Because the stated intent of the Commission was to retain the substance of the current Section 22.13(a)(1) and to ease rather than magnify the information requirements and regulatory burden imposed on applicants consistent with public interest objectives, it appears that the omission of the qualifying language "engaged in Public Mobile Service" was inadvertent.

Analogous real party in interest disclosure requirements in the context of commercial broadcast stations are limited to relevant interests in broadcast, cable or newspaper entities. See FCC Form 301, Section II, item 4h; FCC Form 315, Section II, item 4h; FCC Form 323, item 3. For example, FCC Form 301 requires that the applicant list:

All other ownership interests of 5% or more (whether or not attributable), as well as any corporate officership or directorship, in broadcast, cable, or newspaper entities in the same market or with overlapping signals in the same broadcast service

There is no reason that the Commission should impose a fundamentally different - and substantially more burdensome - set of real party in interest disclosure requirements on a broadband PCS applicant than on applicants in other services.

effectuate. In view of these cited authorities, it is clear that the real party in interest function of Section 24.813 is satisfied if the Commission can verify other relevant ownership interests. The only "relevant" interests are those in CMRS, i.e., broadband PCS applicants and cellular and Specialized Mobile Radio ("SMR") licensees and applicants.^{7/} Simply put, a PCS applicant's attributable interests in grocery stores have no connection with the real party in interest purpose of Section 24.813(a).

2. Compliance with the Anti-collusion Rules.

The prohibition of collusion set forth in Section 1.2105, which is cited by the Commission's statement in the Order of the purposes of the ownership disclosure requirements, addresses cooperation, collaboration and discussions between PCS applicants. See Section 1.2105(c). This rule prevents parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders.^{8/} Ownership interests in non-CMRS entities of persons with an attributable interest in a PCS applicant have no possible relevance to determining compliance with the anti-collusion rules, which looks solely to interaction between PCS applicants.

^{7/} See Sections 20.6(e) (45 MHz CMRS spectrum cap), 24.710 (98 license limit in C and F Spectrum Blocks), 24.204 (40 MHz broadband PCS spectrum cap), and 24.229(c) (35 MHz cellular/PCS spectrum cap).

^{8/} Fifth Report and Order, FCC 94-178, PP Docket No. 93-253 (rel. July 15, 1994) ("Fifth Order") at 39 para. 91.

3. Determining Compliance with Multiple- and Cross-ownership Rules.

As stated in the discussion above regarding real party in interest, the Commission's limitations on multiple- and cross-ownership pertain only to relevant CMRS interests, i.e., other broadband PCS, cellular and SMR. Ownership information regarding entities with no such CMRS interests will in no way advance this purpose.

4. Determining Compliance with the Alien Ownership Restrictions.

Section 310(b) of the Communications Act of 1934, as amended, restricts the officerships, directorships and percentage of ownership interests that may be held by aliens in a broadcast, common carrier or aeronautical en route or aeronautical fixed radio station licensee or company controlling a licensee. The relevant sections of the ownership disclosure requirement are Sections 24.813(a)(3) and (4); Sections 24.813(a)(1) and (2) have no bearing on ownership in the PCS applicant. Clearly, non-CMRS outside holdings of interest holders in applicant have no relevance to alien ownership restrictions.

In view of the above analysis, ownership information regarding non-CMRS holdings has no legitimate relationship of any kind with any of the Commission's stated objectives of the ownership disclosure requirements. The enormous - indeed, in some cases, impossible - task of complying with the requirement, and resulting ill effects, must be recognized. Any broadband PCS license, and particularly a Major Trading Area ("MTA") license, requires a substantial commitment, both to purchase the license and to

construct the system.^{9/} Therefore, in order to further the Commission's goals of promoting competition among a diverse group of service providers and maintaining safeguards against anti-competitive concentration,^{10/} it will be necessary that all but the largest telecommunications companies have free access to large institutional investors. Such access will be even more important in the Designated Entity auctions.^{11/} Under the current rules, these investors - e.g., the large brokerage houses or pension funds - will be required to provide information about other companies engaged in any types of business in which they have a 5 percent or greater interest.

The colossal burden of listing all 5 percent interests is immediately apparent. In many instances, these interests (or, at least, whether the interests equal or exceed 5 percent and are thus reportable) will vary almost daily, so that the risks of inaccuracy are high. Furthermore, to the extent that indirect interests are implicated,^{12/} the complexity and magnitude of the reporting

^{9/} By the Commission's own estimates (which in all likelihood are too low in light of the higher than anticipated prices established in the narrowband auctions), a successful bid for the New York MTA will be in excess of \$277 million, and for even the smallest MTA in the continental United States, Tulsa, will be in excess of \$11 million. See Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd. 2348, 2379 para. 177 (rel. April 20, 1994) ("Second Order"). Actual aggregate costs for winning bids and construction and initial operation should be several multiples of these amounts.

^{10/} Second Order, 9 FCC Rcd. at 2349 paras. 4-5.

^{11/} Fifth Order at 47-48 para. 110.

^{12/} Although the language of the rule covers only direct holdings of attributable stockholders in a PCS applicant, there is no clear guidance on this point. The waiver of the rule in the case of

burden will be vastly increased, and in many instances companies will be charged with an obligation to report holdings of which, at any given time, they have no knowledge.^{13/} Indeed, the burdens are so severe that it can be anticipated that certain investors will avoid PCS altogether, or at least take action to reduce their direct or indirect interests in PCS applicants below attributable levels.^{14/} Either result would be diametrically opposed to the public interest of encouraging institutional investors to invest in small- and medium-sized firms and thereby promote competition among

short form (Form 175) filings crafted such a limitation, by stating that "direct, attributable ownership interests" in CMRS licensees or applicants shall be disclosed. Order at para. 4 (emphasis added). However, the Commission has made it clear that, for purposes of spectrum caps, it will consider indirect interests, computed pursuant to the multiplier. See Further Order on Reconsideration, GEN Docket No. 90-314 (rel. July 22, 1994) at para 5. Accordingly, one could read the current rule in light of the real party in interest and multiple- and cross-ownership purposes discussed above to require that all direct and indirect ownership interests of 5 percent or greater must be disclosed. If the rule continues to require disclosure of direct and indirect interests in businesses of all kinds without limitation, the task facing large institutional investors with attributable interests in PCS applicants would be truly gargantuan.

^{13/} For example, certain pension funds typically invest funds by purchasing limited partnership interests. All control over the limited partnerships' investment decisions is exercised by the general partners. The pension funds do not and, indeed, probably could not keep track on a day to day basis of their indirect investments, whether in PCS, other CMRS or otherwise. See, e.g., the Petition for Reconsideration and Clarification, GEN Docket No. 90-314, filed on September 6, 1994 by the Morgan Stanley Leveraged Equity Fund II, L.P. and Morgan Stanley Capital Partners III, L.P.

^{14/} This chilling effect on investors is compounded by the risk that institutional investors - in many instances without their knowledge - could violate the spectrum aggregation limits, particularly because of their indirect investments.

a diverse group of PCS service providers.^{15/}

III. CONCLUSION

In view of the foregoing, it is hereby requested that the Commission modify Section 24.813(a) of the Rules to provide that disclosure of outside ownership interests in a PCS applicant's short form (Form 175) and long form (Form 401) applications is limited to "such parties as are a broadband PCS applicant or cellular or SMR licensee, permittee or applicant." This limitation is consistent with the waiver set forth in the Order, at para. 4, with respect to the short form (175) applications. Similarly, it is requested that the reach of subsections (a)(1) and (a)(2), for purposes of both short form and long form applications, be limited to direct, attributable ownership interests in relevant CMRS licensees or applicants. This limitation is also consistent with the waiver set forth in the Order, at para. 4.^{16/} These modifications will allow the free flow of capital into small- and medium-sized PCS applicants, ensuring competition among a diverse group of PCS service providers while maintaining safeguards against anti-competitive concentration.

The Broadband PCS MTA auction has already commenced, and Forms 401 must be filed within ten (10) business days after the close of the auction. Because of the time-consuming nature of assembling

^{15/} Second Order, 9 FCC Rcd. at 2349 para. 4.

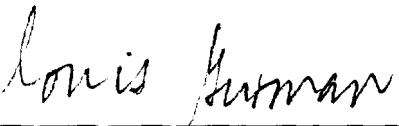
^{16/} It is also requested that any modification of Section 24.813(a) include the limitation on the application of the multiplier as requested in the Letter dated December 16, 1994 from Louis Gurman, Esquire to William E. Kennard, infra p. 3 n. 3.

the information required by the current ownership disclosure rules, it is respectfully requested that the Commission respond to this Petition quickly to allow winning PCS applicants sufficient time to complete their Forms 401 (and supply any necessary supplemental information on their Forms 175).

Respectfully submitted,

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